Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
	)	

COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

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SUMMARY

ALTS recommends that the Commission apply the least intrusive forms of access charge regulation that will protect the interests of consumers with respect to all classes of carriers. There is no evidence that competitive local exchange carriers ("CLECs") have been charging unreasonable rates for access service and, therefore, they do not need to be regulated. In fact, an analysis of CLEC and ILEC access charges shows that, while rate *structures* may vary between the two groups of carriers, the actual amounts that they charge interexchange carriers ("IXCs") for access fall within a relatively small range.

ALTS acknowledges that the Commission has a legitimate interest in ensuring that the access charges applied by all local carriers be reasonable. At the same time, as discussed in the *Notice*, recent disputes between IXCs and CLECs have resulted in IXCs summarily withholding payment of access charges. This is becoming an increasing problem and the Commission must take steps to ensure that IXCs discontinue this practice.[1] In these comments, ALTS proposes a solution that can resolve both of these concerns without involving the Commission and the industry in burdensome new regulations.

As described herein, the Commission should adopt a benchmark analysis to determine presumptively reasonable rates for competitive local carriers. To that end, ALTS has commissioned a study of currently effective ILEC rates that will be used to establish a range of access charges that is typical of the ILEC industry, and that can

1 *Notice* at ¶238.

serve as a reasonable benchmark for CLEC access charges. Using the results of that study, the Commission should find that any CLEC that sets its access charges within the range of reasonableness will be entitled to a strong presumption that its rates are just and reasonable.

Concomitant with such a finding, the Commission must reiterate that self-help refusal to pay is not justified under any circumstances, and that carriers wishing to dispute rates must use the enforcement mechanisms that the Commission has established. As discussed in its comments, the ALTS proposal will provide the IXC community with assurances that access charges will be set at reasonable levels, and will provide CLECs with assurances that they will be paid for the services they provide.

ALTS further recommends that the Commission retain the existing structure of flat-rated and per-minute charges for recovery of interstate access charges by dominant local exchange carriers, and that it refrain from adopting a "capacity-based" pricing structure.

With regard to other issues, the Commission:

- should confirm that 800 and 888 services should be treated as terminating access for all purposes;
- should not expand its permissive detariffing of CLEC access charges to require mandatory detariffing;
- should not allow IXCs to charge different rates to end users within the same geographic area based upon the level of charges levied by the end user's local exchange company; but it may

- consider equalizing originating and terminating access charge rate levels if further information received by the Commission indicates that market forces are inadequate to ensure reasonable access charges.

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TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Service ("ALTS"), by its attorneys, hereby submits these comments on the *Fifth Report and Order and Further Notice of Proposed Rulemaking* issued by the Federal Communications Commission's ("FCC" or "Commission") in the above-captioned proceeding.[2] ALTS is the major national trade association representing facilities-based competitive local exchange carriers ("CLECs").

I. INTRODUCTION

ALTS recommends that the Commission apply the least intrusive forms of access charge regulation that will protect the interests of consumers with respect to all classes of carriers. There is no evidence that CLECs have been charging unreasonable rates for access service and, therefore, they do not need to be regulated. In fact, an analysis of

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[2] *Access Charge Reform,* CC Docket No. 96-98, *Fifth Report and Order and Further Notice of Proposed Rulemaking* (FCC 99-206, rel. Aug. 27, 1999) (*"Notice"*).

CLEC and ILEC access charges shows that, while rate *structures* may vary between the two groups of carriers, the actual amounts that they charge interexchange carriers ("IXCs") for access fall within a relatively small range.

ALTS acknowledges that the Commission has a legitimate interest in ensuring that the access charges applied by all local carriers be reasonable. At the same time, as discussed in the *Notice*, recent disputes between IXCs and CLECs have resulted in IXCs summarily withholding payment of access charges. This is becoming an increasing problem and the Commission must take steps to ensure that IXCs discontinue this practice.[3] In these comments, ALTS proposes a solution that can resolve both of these concerns without involving the Commission and the industry in burdensome new regulations.

As described herein, the Commission should adopt a benchmark analysis to determine presumptively reasonable rates for competitive local carriers. To that end, ALTS has commissioned a study of currently effective ILEC rates that will be used to establish a range of access charges that is typical of the ILEC industry, and that can serve as a reasonable benchmark for CLEC access charges. Using the results of that study, the Commission should find that any CLEC that sets its access charges within the range of reasonableness will be entitled to a strong presumption that its rates are just and reasonable.

Concomitant with such a finding, the Commission must reiterate that self-help refusal to pay is not justified under any circumstances, and that carriers wishing to

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[3] *Notice* at ¶238.

dispute rates must use the enforcement mechanisms that the Commission has established. As discussed in more detail below, the ALTS proposal will provide the IXC community with assurances that access charges will be set at reasonable levels, and will provide CLECs with assurances that they will be paid for the services they provide.

In contrast to CLECs, incumbent local exchange carriers ("ILECs") continue to enjoy dominant market power and have strong incentives to exercise it in predatory ways. For that reason, ALTS recommends that the Commission exercise caution when granting additional rate-making flexibility to ILECs. In particular, the so-called capacity-based rate-making concepts mentioned in the *Notice* lack sufficient definition to prevent predatory pricing by ILECs seeking to target and extinguish their competitors. New rules, if and when they are adopted, should have a coherent relationship with underlying costs and the practical ability to prevent anti-competitive conduct. ALTS recommends that the Commission continue to study this important issue but that, until a demonstrably more reliable guide is proposed, it maintain the existing combination of per-minute and flat monthly access charges for dominant carriers.

II. ACTIVE REGULATION OF CLEC ACCESS CHARGES WOULD BE BOTH UNNECESSARY AND UNDULY BURDENSOME

The Commission has sought comment on the issue of active regulation of CLEC access charges based on the concern that it "may have overestimated the ability of the marketplace to constrain CLEC access rates."[4] This concern is wholly misplaced because it is based on a misconception – that CLECs charge more for access charges than

[4] *Notice* at ¶238.

comparably situated ILECs. There are two things wrong with this assumption: it does not take into account all charges applied to IXCs by ILECs, and it fails to compare CLECs with similarly situated ILECs.

It is true that a simplistic comparison of per-minute rates tariffed by CLECs and some ILECs can show significant discrepancies – a typical Tier 1 ILEC charges 1.5 to 2.5 cents per minute, while a typical CLEC may charge 4 to 5 cents.[5] This analysis is misleadingly oversimplified, however, because it fails to account for the non-usage-based charges that the ILECs impose on IXCs. In addition to per-minute access charges, ILECs can require IXCs to pay monthly per-line presubscribed interexchange carrier charges ("PICCs") as high as $4.25 plus upward adjustments for inflation, and that amount can continue to rise by as much as $1.50 plus inflation every year.[6] In addition, ILECs assess flat rate port charges for switching while many CLECs do not. If these amounts are taken into account to compute *overall* ILEC charges, it reveals much higher per-minute rates charged by ILECs. In fact, an analysis that properly considers all relevant charges will demonstrate that CLEC access charges are not substantially higher than the total charges that ILECs impose on IXCs.[7] ALTS has commissioned such an analysis, and discusses

5 The Commission has several times repeated the AT&T assertion that CLEC rates "in some cases" are more than twenty times those charged by the incumbent LECs against which the CLECs compete. Even when looking at only the per-minute charge, however, there is no proof that any CLEC charges anywhere near 20 times what the ILEC with which it competes charges. The one case that AT&T cites in its petition, that of Sharon Telephone, is factually inaccurate. Sharon Telephone is a small *ILEC* that does not compete with Ameritech.

6 47 C.F.R. §69.153(d)(2)(ii).

7 CLECs are not required to apply PICCs to IXCs and, thus, are at liberty to collect all access payments from IXCs in the form of per-minute charges. *See id.* and 47 C.F.R. §69.151 (the subpart of the Commission's Rules that requires application of PICCs applies only to carriers subject to price cap regulations). *See also* Tariff Filing Requirements for Non-Dominant Carriers, CC Docket No. 93-36, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6754 (1993) (CLECs are non-dominant carriers

the preliminary results in these comments. The complete study will be concluded shortly, and will be filed with the Commission by the reply round of comments in this proceeding.

The economic analysis commissioned by ALTS will also compare CLEC rates with the rates being charged by comparably-sized ILECs. The Commission has long recognized that, everything else being equal, larger carriers will typically have lower unit costs for switching than smaller carriers, because of scale economies.[8] This recognition is reflected in cost allocation rules tied specifically to the number of access lines served by carriers, without regard to loop lengths involved.[9] On this basis, the principal access charge tariff filed by the National Exchange Carrier Association contains seven rate bands for end office switching[10] and four rate bands for switched transport.[11] A CLEC may also experience substantial transport costs as it backhauls traffic from customers in scattered parts of a metropolitan area. The latter cost does not represent a source of inefficiency, however, since it is widely recognized that declining transmission costs have reduced the need for intermediate switching points. The ALTS economic analysis

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because they have not been previously declared dominant), *vacated and remand in part on other grounds*, Southwestern Bell Corp. v. FCC, 43 F.3d 1515 (D.C. Cir. 1995); *on remand*, 10 FCC Rcd 13653 (1995).

[8] "The Commission has recognized that smaller telephone companies have higher local switching costs than larger incumbent local exchange carriers (ILECs) because the smaller companies cannot take advantage of certain economies of scale." *National Exchange Carrier Assn., Inc. Proposed Modifications to the 1998-99 Interstate Average Schedule Formulas*, 13 FCC Rcd 24225, 1998 FCC LEXIS 6539 (Dec. 22, 1998) at n. 6.

[9] *See* Section 47 C.F.R. Sec. 36.125(f).

10 The rates shown for local switching range from 0.9 cents per minute to 2.4 cents per minute. *NECA Tariff F.C.C. No. 5,* §17.2.3, 25th Revised Page 17-11. The tariff lists the pertinent rate bands for each participating carrier. *Id.* at §17.5.1, 3rd Revised Page 17-43 *et seq.*

11 The per-minute rates shown for premium transport interconnection range from 0.5 cents per minute to 1.26 cents per minute. NECA Tariff F.C.C. No. 5, §17.2.2 at 3rd Revised Page 17-10.2.1.

will also explore the declining unit costs that CLECs can expect to achieve as they grow and are able to take full advantage of scale economies and design efficiencies.

The proposals for regulating CLEC access charges under consideration by the Commission would cut profoundly against the policies that form the underpinnings of the Telecommunications Act of 1996 ("the '96 Act").[12] Under that Act, every telecommunications carrier has a fundamental duty to interconnect directly or indirectly with other telecommunications carriers,[13] but the Commission has an equally fundamental duty to forbear from regulating any class of telecommunications carrier if such regulation is not necessary.[14] The legislative history of the '96 Act clearly reveals Congress's desire to rely on competition rather than regulation, except where necessary to prevent incumbent carriers from using dominant market control unfairly against their competitors.[15] It would clearly defeat Congress's purpose to impose rate regulation on nondominant CLECs.

Indeed, the approach that the Commission has put out for comment would be the most radically regulatory intrusion into a competitive industry segment that the FCC has ever undertaken. The resulting burden on the competitive local services industry would have a profound – and adverse – impact on the development of local competition. Moreover, the resulting enforcement obligations of the Commission would divert scarce regulatory resources from the most important goal the Commission must achieve – the

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12 Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

13 47 U.S.C. §251(a).

14 47 U.S.C. §160(a).

15 *See, e.g.,* H.R. Conf. Rep. No. 104-204, at 48 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 11.

full implementation of the pro-competitive provisions of the '96 Act. The Commission's staff is already stretched to the limit attempting to implement the FCC's collocation rules, which remain largely unimplemented five months after the Commission's order took effect;[16] implementing the Commission's forthcoming Unbundled Network Elements Remand Order;[17] and establishing effective enforcement processes to yield readily available, expedited resolution of interconnection-related disputes.

Such a diversion of resources would be especially egregious if it were applied to an illusory "problem" where there is no evidence that regulation is necessary. Even with respect to terminating access charges, where the Commission alludes to market structure concerns, commenters have explained how market forces can be expected to drive prices to cost-based levels. The U.S. Telephone Association challenges the fundamental premise that, because the called party is not paying for the call, terminating access charges are shielded from downward market pressures.[18] If any LEC were to overprice terminating access relative to originating access to such an extent that the IXC were driven to set its prices for incoming calls higher than its prices for outgoing calls, a pair of callers in repeated communications would have an incentive to alter their pattern of

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16 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 1999 FCC LEXIS 1327 (Mar. 31, 1999).

17 *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Further Notice of Proposed Rulemaking, FCC 99-70 (released April 16, 1999) ("*UNE Second Notice*"); AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999). The Commission has adopted but not yet released an order addressing the issues raised in the *UNE Second Notice*.

18 *Notice* at ¶240, *citing* USTA *Access Reform NPRM* Comments, Attachment 3 at 12.

calls to favor the lower-priced alternative.[19] This is readily apparent in the emergence of sophisticated call-turnaround services for international calls, where foreign countries charge higher originating rates than carriers based in the United States.

TCI asserts that CLECs do not have market power because IXCs can exercise bargaining power directly when negotiating interconnection agreements with CLECs.[20] The market power of the largest IXCs is demonstrated in a recent enforcement action by the Commission, *MGC v. AT&T.*[21] As that case and other evidence of IXC practices makes clear, the largest IXCs are threatening to withhold their enormous traffic volumes in an attempt to force CLECs to reduce their access charges.[22] The reality is that CLECs are the vulnerable parties in these relationships, because they are subject to the market power wielded by the largest carriers – power that will continue to increase as the number of "mega carriers" grows due to mergers among the largest players in the industry.

As ALTS discusses in these comments, CLEC access charges are currently set at reasonable levels. The Commission need not regulate a problem that does not exist.

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[19] *See id.* IXCs are at liberty to vary the rates that they charge for calls to reflect the costs of terminating access, provided that they avoid the forms of discrimination that are barred by Section 254(g) of the Communications Act, 47 U.S.C. §254(g). The fact that few IXCs vary their rates on this basis is further evidence that terminating access charges applied by CLECs must not be unreasonably out of line with rates charged by ILECs.

[20] *Notice* at ¶240, *citing* TCI *Access Reform NPRM* Reply, Attachment A at 8.

[21] *See MGC Communications, Inc. v. AT&T Corp.*, File No. EAD-99-002, DA 99-1395 (rel. Jul. 16, 1999) ("*MGC v. AT&T*").

[22] Sprint has also begun refusing to pay CLEC access charges, and AT&T's principal interstate tariff was recently amended to provide, "In the absence of access arrangements between the Company and the access provider at a particular Station, a Customer may be unable to place calls from or to the affected Station." *See* AT&T Tariff F.C.C. No. 1, 16th Revised Page 21, effective Aug. 20, 1999, at §2.1.6.A(2).

III. IN ORDER TO PROVIDE REGULATORY CERTAINTY AND OBVIATE UNNECESSARY LITIGATION, THE COMMISSION SHOULD ESTABLISH A PRESUMPTIVELY LAWFUL "BENCHMARK" RATE FOR CLEC ACCESS CHARGES

As noted above, active regulation of CLEC access charges is unnecessary and would be overly burdensome both to the Commission and to CLECs. ALTS acknowledges, however, that all parties would benefit from establishing a standard for access charges that would (1) provide assurance to IXCs that access charges are reasonable; (2) provide assurance to CLECs that they will recover for the services they provide to IXCs; (3) minimize the regulatory burden on all parties and (4) obviate unnecessary litigation. To this end, ALTS proposes that the Commission adopt a "benchmark" rate approach to identify a rate level for CLEC access charges that will be deemed presumptively reasonable.

The benchmark rates that ALTS will propose, following completion of an economic analysis, will be based on the total charges that ILECs assess upon IXCs.[23] Use of cost-supported ILEC rates as a basis for setting comparable CLEC rates is an approach the Commission has used in establishing reciprocal compensation. The FCC has a long history of regulation using benchmarks and "bellweather" companies to set rates – ranging from international telephone settlements rates,[24] to cable television rates,[25]

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[23] We note, however, that the monies that ILECs receive from IXCs are not all the payments that they receive for access services. ILECs also receive substantial sums directly from end users in the form of FCC-mandated subscriber line charges.

[24] *International Settlement Rates*, IB Docket No. 96-261, Report and Order, 12 FCC Rcd 19,806 (1997), aff'd sub. nom., *Cable & Wireless et al. v. FCC*, No. 97-1612 (D.C. Cir., Jan. 12, 1999) ("International Benchmarks Order").

rates charged to interexchange carriers by local exchange carriers that participate in tariffs based on industry average costs,[26] and annual productivity improvement factors applied to price caps for larger local exchange carriers.[27] The approach that ALTS proposes herein is fully consistent with these established precedents.

The study that ALTS has commissioned will be completed by the reply round in this pleading cycle. Preliminary analysis shows that the benchmark rate derived from this analysis will likely be somewhere between four and six cents per minute. This study will not be limited to looking simply at Tier 1 ILEC per-minute access charges. Such a simplistic view overlooks the significant charges that the Commission removed from ILEC per-minute rates and converted to flat rate charges or other non-access charges in its 1997 *Access Reform Order*.[28] Rather, it will capture all rates that IXCs effectively pay to ILECs and will convert them into per-minute charges, so that a true apples-to-apples comparison can be made between ILEC and CLEC access charges. Tier 1 ILECs collect not only per-minute access charges but also include flat-rated monthly presubscribed

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[25] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order, MM Docket No. 92-266, 8 FCC Rcd 5631, 5768-69, 5770-74, 5777-78, 5881-83 (1993) ("*Cable Rates Order*"), *recon.*, 9 FCC Rcd 1164, 1171-79 (1993); 47 C.F.R. §76.956(b). Since the cable benchmark methodology is based in part on industry-wide data, it does not necessarily reflect individual systems' costs of providing cable service. The Commission concluded that the benchmark methodology may not permit all cable operators to fully recover the costs of providing service and to continue to attract capital. Consequently, the Commission decided to allow cable operators to exceed the rate level permitted under the benchmark methodology, provided that they could make the requisite cost showings demonstrating that the rate in question was reasonable even though it exceeded the permitted benchmark level. *Cable Rates Order*, 8 FCC Rcd at 5794.

[26] 47 C.F.R. §69.606(a). For background, *see National Exchange Carrier Association, Inc. Proposed Modifications to the 1998-99 Interstate Average Schedule Formulas*, 14 FCC Rcd 4049 (1999).

[27] 47 C.F.R. §61.44(b).

[28] *Access Reform First Report and Order*, 12 FCC Rcd 15982 (1997).

interexchange carrier charges and charges for line ports and dedicated trunk ports.[29] For comparison purposes, the analysis will also show the rates charged by NECA average schedule carriers.

The Commission should find that originating and terminating access charges that fall at or under the benchmark rate identified in the ALTS study are presumptively lawful and reasonable and make it clear that it will not entertain a Section 208 complaint against such rates absent a strong showing of unreasonableness.[30] It should also find presumptively reasonable any CLEC rates that are set at or below the ILEC rates within the service area served by both carriers. Such a finding would provide IXCs with protection against excessive rates, while guaranteeing CLECs that they can recover reasonable charges for the services they provide.[31]

Such a presumption will be inherently conservative because, as new entrants to the local markets, CLECs may initially face higher costs for some network elements than established incumbent LECs. For example, ILECs have a mature customer base, and when they install a new switch, they reach a high level of utilization immediately. Conversely, a CLEC typically is still growing its customer base when it deploys its switches, and necessarily takes more time to reach a similar level of switch utilization.

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29 *Id.* at ¶127.

30 All rates filed by CLECs are already presumed lawful until and if they are suspended and set for investigation by the Commission. The Commission may later prescribe a change in those rates pursuant to Section 205, and such rates may be challenged in a complaint filed pursuant to Section 208, but the Commission may only changes the rates on a going-forward basis. The Commission has interpreted a provision of the Telecommunications Act of 1996 as having taken away its authority to order retroactive rate changes or damage awards. *See Implementation of Section 402(B)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 2170 (1997), at ¶¶8, 18, and 20-21.

Thus, while ILEC and CLEC per-unit switch costs may eventually converge, when a CLEC first enters a market, its per-unit switch costs will be higher than the incumbent LEC's, and would justify higher access charges.

As with any benchmark approach, the Commission will be called upon to determine which companies provide the most relevant baselines for comparison. Sprint argues that an IXC should never be required to pay higher access charges to a CLEC than it pays to the ILEC serving the same geographic area, even in circumstances where the CLEC can conclusively demonstrate that its costs are higher than the ILEC's.[32] On this basis, Sprint has unilaterally begun refusing to pay any access charges in excess of ILEC rates, in direct violation of Commission rules providing that all tariffs become effective when filed and remain so until and if the Commission suspends them or prescribes different tariffs.[33] If Sprint is advocating that the Commission compel CLECs to provide access service at rates below their costs of providing service, it would clearly violate the Takings Clause of the U.S. Constitution.[34] Even if those concerns were somehow

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[31] Though the Commission should establish a presumption that CLEC access charges at or below a benchmark are reasonable, it should not automatically assume that rates above the benchmark are unreasonable.

[32] Reply Comments of Sprint Communications Co., LP, in CCB/CPD No. 98-63, filed Dec. 22, 1998.

[33] As part of the Telecommunications Act of 1996, Congress added a new subsection 3 to section 204(a) of the Communications Act of 1934, which the Commission has subsequently interpreted as providing (1) that a tariff that becomes effective without suspension and investigation is lawful; (2) the tariff can subsequently be found unlawful in a rate prescription proceeding under section 205 or in a complaint proceeding under section 208, but (3) the Commission may change the rate prospectively only and may not award refunds or damages for the time when the previously filed rate was in effect. *Implementation of Section 402(B)(1)(A) of the Telecommunications Act of of 1996*, CC Docket No. 96-187, Report and Order, 12 FCC Rcd 2170 (1997).

[34] The Takings Clause provides, "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. If a carrier can demonstrate that rules or practices establishing rate ceilings for some or all of its services are confiscatory in their effect, the carrier is entitled to adjust those rates above the levels defined by those rules or practices. *See Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). The "just and reasonable" standard of federal ratemaking statutes coincides

addressed, however, implementation of Sprint's proposal would raise other significant issues. Assume, for example, that Sprint were to deny service to CLECs in markets where their prices are higher than ILECs', but that, in other markets, CLEC access charges were lower than the ILECs'. It would be unreasonably discriminatory for Sprint to refuse to interconnect with high-priced CLECs without applying the same standards to high-priced ILECs, i.e., denying service to ILECs when their rates are higher than a locally available CLEC's rates.[35] To comply with anti-discrimination requirements, Sprint would have to divert its traffic away from ILECs onto CLECs wherever the CLEC rates were lower.[36] If Sprint is allowed to embark along the path of refusing to interconnect with CLECs when their prices are higher than ILECs, it should be required to apply the same standard to ILECs, including ILECs faced with lower prices by neighboring ILECs.[37]

In establishing benchmarks, the Commission should establish a strong presumption that CLEC access charges equal to or below that level are reasonable.

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with the constitutional standard derived from the due process and taking clauses of the Fifth Amendment. *Id.* at 315 U.S. 586. *See also Jersey Cent. Power and Light Co. v. FERC,* 810 F.2d 1168, 1178 (D.C. Cir. 1987).

35 *See* 47 U.S.C. §202(a).

36 Sprint's logic could lead to similar consequences with respect to neighboring ILECs, which are also capable of competing with each other for the provision of access services. In one heavily documented but otherwise typical case from the 1980s, for example, the Atlantic Richfield Company ("ARCO") used a private microwave communications network to re-route traffic from its research complex in Plano, Texas, to its Texas headquarters in Dallas, 19 miles away. ARCO thereupon notified GTE, the ILEC serving Plano, that it would no longer need 73 trunks and the corresponding 1,600 direct inward-dial ("DID") numbers provided by GTE because it did not wish to use GTE's facilities to transmit calls from the Plano lab to points off of ARCO's network beyond Plano. To replace the cancelled GTE trunks, ARCO ordered 81 additional trunks and 2,000 DID numbers from Southwestern Bell in Dallas. The FCC affirmed ARCO's right to elect this reconfiguration, and a U.S. Court of Appeals affirmed the FCC's decision. *See Public Utility Commission of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989) ("the *ARCO* case").

37 *See id.*

Although the rates would remain subject to the Section 208 complaint process, the Commission should make it clear that it will not entertain such a complaint absent a clear showing of unreasonableness. The fact that a CLEC rate falls within the benchmark should be highly probative of its lawfulness. This approach would be consistent with the Enforcement Division's recent order in *MGC v. AT&T*.

The Commission's rules already provide that, for purposes of suspension or rejection of new tariff filings, tariff filings by non-dominant carriers will be considered prima facie lawful, and will not be suspended by the Commission unless the petition requesting suspension shows: (a) that there is a high probability the tariff would be found unlawful after investigation; (b) that the suspension will not substantially harm other interested parties; (c) that irreparable injury will result if the tariff filing is not suspended or rejected; and (d) that the suspension would not otherwise be contrary to the public interest.[38] The Commission should apply the same standards to complaints filed pursuant to Section 208 alleging that CLEC access charges are too high even though they are at or below a Commission-approved benchmark. In other words, a CLEC should not be obligated to conduct a cost study merely because an IXC files a complaint, unless the complainant makes the same kind of four-part demonstration described above.[39]

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[38] 47 C.F.R. §1.773(a)(1)(ii).

[39] The Commission explains by example what kinds of showings would satisfy the four-part criteria. Price cap carriers offering within-band rates are not required to supplement their original rate filings unless a complainant provides information such as persuasive evidence of several rate increases in succession for a particular service, discriminatorily high increases for certain services, or precipitous decreases having anti-competitive effect. *Policy and Rules Concerning Rates for Dominant Carriers,* 5 FCC Rcd 6786 (1990) at ¶294, n. 379. *See also AT&T Price Cap Order*, 4 FCC Rcd at 3099-3100, ¶458.

This approach would also be consistent with the Commission's established practice of relying on the formal complaint process as a guarantor of reasonable rates. Thus, in the order portion of the *Notice* granting ILECs additional pricing flexibility, the Commission repeatedly found that, if ILECs abuse the pricing flexibility rules to establish unreasonable rates, affected carriers will be fully protected by their right to pursue Section 208 complaints.[40] The Commission also emphasized that it will consider Section 208 complaints alleging that rates charged pursuant to volume discounts are unreasonably low or otherwise in violation of Section 201 of the Communications Act.[41] In other proceedings, the Commission has repeatedly reassured the public that Section 208 will be a sufficient backstop against unreasonable discrimination for customers facing discrimination – e.g., when the Commission approved a liberalized pricing scheme for AT&T in that carrier's Tariff 12 proceeding,[42] and when AT&T was subsequently reclassified as a nondominant carrier.[43] Following all these decisions to eliminate or reduce regulation of industry behemoths coupled with repeated assurances that Section 208 will suffice to address any lingering concerns of users or competitors, it would be supremely ironic if the Commission were to decide in this proceeding that Section 208 cannot provide sufficient protection against CLEC misbehavior, and that this nascent industry must therefore fall under the iron hand of mandatory rate regulation.

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[40] *See, e.g., Notice* at ¶131.

[41] *Notice* at ¶127.

[42] AT&T Communications, Revisions to Tariff FCC No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932 at ¶66, *recon. denied*, 4 FCC Rcd 7928 (1989), *reversed and remanded on other grounds sub nom.MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C.Cir. 1990), *on remand*, 6 FCC Rcd 7039(1991).

IV. THE COMMISSION SHOULD CLARIFY THE LIMITED INSTANCES IN WHICH AN IXC MAY REFUSE TO INTERCONNECT WITH A CLEC

In the *Notice*, the Commission raises the fundamental question of an IXC's obligation to accept originating traffic from, or deliver terminating traffic to, a LEC. This precise issue arose recently in the context of MGC Communications, Inc.'s ("MGC") complaint against AT&T.

In *MGC v. AT&T*, MGC sued AT&T for improperly refusing to pay MGC for originating exchange access service that AT&T ordered and accepted pursuant to MGC's validly filed tariff. After an expedited hearing under the Commission's accelerated docket procedures, the Commission's Common Carrier Bureau (the "Bureau") concluded that AT&T's refusal to pay for the *originating* access service it had received from MGC amounted to impermissible self-help and a violation of Section 201(b) of the Communications Act because AT&T had failed to terminate its access relationship with MGC. Although the Bureau also found that MGC had failed to identify a legal impediment to an IXC declining to purchase a particular LEC's access service, it explicitly stated that its holding was narrowly limited to the arguments raised by the parties.[44] The Bureau specifically stated:

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[43] *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995) at ¶¶13, 132, and 168.

[44] MGC raised several potential statutory and regulatory constraints on AT&T's ability to terminate its originating access service. The Bureau rejected these arguments, and concluded that none of the statutes, rules, or orders governing equal access, dialing parity, or payphone services imposes any obligation on AT&T that would prevent it from rejecting MGC's originating access service, should it choose to do so. *See MGC v. AT&T*, at 7.

> By holding that none of the obligations we discuss above prevents AT&T from declining MGC's originating access service, we do not imply that AT&T is entirely without constraint in determining where, how, or to whom it will provide its long distance services. Naturally, in providing those services, AT&T remains subject to a broad variety of statutory and regulatory constraints that are too numerous to list here, but which include, without limitation, sections 201, 202, 203 and 214 of the Act and section 63.71 of the Commission's rules. Additionally, AT&T's tariffs likely also place restrictions on the manner in which it offers its services to its customers. AT&T may well be subject to other statutory or regulatory restrictions in its purchase of access service—either originating or terminating—but MGC has not raised them in this proceeding.[45]

The Bureau thus left open the possibility that there may be statutory or regulatory constraints that would prevent an IXC from declining a CLEC's originating and/or terminating switched access services. As ALTS explains in detail below, several provisions of the Communications Act, as well as the Commission's rules and decisions, constrain an IXC's ability to block (or require other carriers to block) originating and/or terminating toll traffic. Moreover, applicable law preludes an IXC from terminating a CLEC's originating and terminating switched access service, as well as withholding payment to the CLEC for previously provisioned access service.

A. The Commission Should Reaffirm Its Long-Standing Policy That Carriers May Not Use Self-Help To Resolve Rate Disputes

In *MGC v. AT&T*, the Bureau explicitly found that AT&T's refusal to pay MGC for the originating switched access service that it had received from MGC amounted to "impermissible self-help and a violation of section 201(b) of the Act."[46] Recently, some interexchange carriers have, in complete disregard for the Bureau's holding in *MGC v.*

45 *MGC v. AT&T*, at 6-7.

AT&T and a long line of Commission precedent, chosen unilaterally to withhold payment to CLECs for originating and terminating switched access services.[47] In view of the arrogance exhibited by these major interexchange carriers, the Commission should take this opportunity to reaffirm its long-standing policy that carriers may not use self-help to challenge another carrier's charges.

The Commission has stated many times that a customer, whether an end user or another carrier, is not entitled to the self-help measure of withholding payment for tariffed services duly performed, but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations.[48] Under applicable Commission precedent, customers who claim that tariff rates are unreasonable may file complaints with the Commission under Section 208 of the Communications Act, but may *not* withhold payments of legally tariffed charges merely by asserting that the rates are unreasonable.[49] Thus, a carrier who disputes another carrier's tariffed charges is not without any recourse. Indeed, where a

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46 *MGC v. AT&T*, at 13.

47 *See, e.g., MGC Communications, Inc. v. Sprint Corporation* (formal complaint filed Oct. 6, 1999) (complaining of Sprint's refusal to compensate MGC for originating and terminating switched access services at MGC's tariffed rates). *See also* Letter from Gary Lindsey, Director, Sprint, to Darren Adair, Controller, MGC Communications, Inc., Aug. 12, 1998 (advising MGC that Sprint "will withhold payment, both on a going-forward basis, and for past bills MGC has rendered, the difference between MGC's rates and those of the ILEC serving Las Vegas in the NPA NXXs in question").

48 *See, e.g., MCI Telecommunications Corp*., 62 FCC 2d 703, 705-06 (1976) (customer may not withhold payment of properly billed tariffed charges for voluntarily ordered services); *Business WATS, Inc. v. AT&T*, 7 FCC Rcd 7942 (1992) ("a customer . . . is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper . . . .").

49 *See, e.g., Communique Telecommunications, Inc. d/b/a LOGICALL*, 10 FCC Rcd 10399, 77 RR 2d 1339 (1005).

complainant prevails in a Section 208 action, it would be entitled to recover the unlawful charges as well as consequential damages and interest.[50]

The Commission's policy against self-help is grounded on, among other things, Section 203(c) of the Communications Act. Section 203(c) of the Communications Act imposes a requirement on all carriers to collect their lawful tariffed charges.[51] Allowing IXCs to withhold payment for services rendered puts the CLEC providing the services *directly* in violation of Section 203(c) of the Communications Act. If the Commission eschews conduct in violation of Section 203(c), it should similarly not countenance self-help remedies that have the effect of putting CLECs in violation of Section 203(c).

Permitting IXCs to resort to self-help not only interferes with the Commission's ability to properly adjudicate disputes, but also unnecessarily creates confusion and uncertainty. Moreover, it allows IXCs to avoid their financial obligations, albeit temporarily, under the guise of a rate dispute. Similarly, it ultimately and inappropriately shifts the onus of filing a Section 208 complaint from the IXC to the CLEC.

B. The Commission Should Clarify That An IXC That Accepts Originating Toll Traffic From a CLEC Is Obligated To Pay The CLEC's Tariffed Rates in All Instances

Customer Account Record Exchange ("CARE") records are transmitted routinely between the CLECs and the IXCs to notify the IXC when an end user customer becomes presubscribed to that IXC and to provide the IXC with customer name, address, and other

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50 *AllNet Communications Services, Inc. v. Bell* Atlantic, 73 RR 2d 1222, 8 FCC Rcd 5438, 1993 FCC LEXIS 4097 (1993*) ("AllNet Communications*").

51 *See* 47 U.S.C. § 203(c). *See also AllNet Communications*

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account information.[52] Similarly, CLECs provide IXCs with Billing Name and Address ("BNA"), which is defined as "the name and address provided to a local exchange company by each of its local exchange customers to which the local exchange company directs bills for its services,"[53] so that the IXCs can be paid for their services directly by the LEC customers responsible for the charges.[54] The exchange of CARE and BNA records between the CLEC and IXC establishes a carrier-to-carrier relationship pursuant to which the IXC accepts originating toll traffic from CLECs—and hence accepts the CLEC's originating switched access service—regardless of whether a written order, service request, or agreement between the CLEC and the IXC exists. Accordingly, the Commission should clarify that, where the course of dealings between the CLEC and the IXC involves the IXC submitting CARE and BNA requests to the CLEC—and the CLEC providing CARE and BNA records pursuant to the IXC's requests—the IXC may not, in disputes involving the IXC's obligation to compensate the CLEC for services provided, assert that the IXC did not order originating switched access service from the CLEC. The Commission should declare that the doctrine of equitable estoppel appropriately should apply in such a situation because the CLEC reasonably relied upon the existence of a carrier-to-carrier relationship. In addition, failure to equitably estop the IXC from asserting that there is no relationship between it and the CLEC will unjustly enrich the IXC, the IXC having benefited from the originating toll traffic sent by the CLEC. In all events, the Commission should clarify that, where a carrier-to-carrier relationship

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52 *See MCI Emergency Petition for Prescription*, CC Docket No. 97-250, Memorandum Opinion and Order, 13 FCC Rcd 11127, 11129 (1998).

53 *See* 47 C.F.R. § 64.1201(a)(1).

between the IXC and the CLEC is shown to exist, the IXC may not refuse to compensate the CLEC for switched access services at the CLEC's tariffed rates.

Likewise, the Commission should clarify that if the IXC allows itself to become the CLEC customer's presubscribed interexchange carrier ("PIC"), the IXC may not deny the existence of a carrier-to-carrier relationship between the IXC and the CLEC. In such a case, to the extent the CLEC originates and hands off toll traffic to the IXC, the IXC is responsible for compensating the CLEC, at the CLEC's tariffed rate, for the provision of originating switched access service—without regard to whether a written order, service request, or agreement exists between the IXC and the CLEC.

Finally, IXCs typically advertise on various media the availability of 8YY and dial-around (10-10XXX) service. To the extent an IXC indiscriminately and publicly solicits 8YY and 10-10XXX traffic, and a CLEC originates 8YY and 10-10XXX traffic destined to the IXC, the Commission should clarify that the IXC may not refuse to compensate the CLEC, at the CLEC's tariffed rate, for the provision of originating switched access service—even in the absence of a written order, service request, or agreement between the CLEC and the IXC.

C. The Commission Should Require an IXC That Desires to Terminate a CLEC's Switched Access Service and Long Distance Service to the CLEC's Customers to Demonstrate Compliance With the Communications Act and the Commission's Rules And Decisions

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[54] *See Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, CC Docket No. 91-115, Second Report and Order, 8 FCC Rcd 4478 (1993).

As noted above, in *MGC v. AT&T*, the Bureau explicitly found that, in providing long distance service, AT&T remains subject to a broad range of statutory and regulatory constraints. Thus, the Bureau left open the possibility that an IXC may well be precluded from terminating long distance service to CLEC exchange customers and refusing CLECs' originating and terminating switched access services. As explained below, the Communications Act and the Commission's rules and decisions are violated when an IXC terminates long distance service to a CLEC's telephone exchange customer and/or the CLEC's switched access services.

1. An IXC's Refusal to Provide Long Distance Service to a CLEC's Customer Contravenes the Fundamental Principle of Universal Access to Telecommunications Services.

The Communications Act and the Commission's rules and decisions implementing it are premised on the principle that telecommunications services must be universally available to all Americans. This principle is reflected in Section 254 of the Communications Act, which requires that "[c]onsumers in all regions of the Nation . . . should have access to telecommunications and information services, *including interexchange services* and advanced telecommunications and information services . . . ."[55] In addition, over the years, the Commission has consistently endeavored to ensure that its policies encourage telephone subscribership and usage of the public switched network in the United States.[56]

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[55] 47 C.F.R. § 254(b)(3) (emphasis added).

An IXC's refusal to provide long distance service to a CLEC's customers would contravene this fundamental principle because it would deprive the CLEC's customers of access to the interexchange service offered by that IXC. Although there may be alternative sources of interexchange service, an IXC's refusal to permit a CLEC's customer to use the IXC's long distance service significantly decreases the choices available to that customer. This concern is particularly pronounced in rural and insular areas where there may not be multiple providers of telephone exchange service. An IXC that refuses to provide service to a CLEC's customer *unless* that customer chooses another telephone exchange provider effectively limits the customer's choice of telephone exchange provider and long distance carrier—and thus directly constrains the customer's access to available telephone exchange and interexchange services in contravention of, *inter alia,* Section 254. Furthermore, as discussed below, this creates a situation where the IXC can discriminate in favor of an affiliated CLEC.

2. An IXC's Refusal to Send Traffic to, and Accept Traffic from, a CLEC Directly Violates the Interconnection Requirements of Sections 201(a) and 251(a)(1).

There are at least two ways by which an IXC and a CLEC may exchange toll traffic. One way is for the IXC and the CLEC to each establish direct trunks to the incumbent local exchange carrier's tandem switch where, typically, long distance traffic from other carriers is aggregated and then sent to the intended destinations—thus, terminating toll traffic destined to a CLEC's customer is directed to the CLEC, and

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[56] *See Amendment of the Commission's Rules and Policies to Increase Subscribership and Usage of the Public Switched Network*, CC Docket No. 95-115, FCC 95-281, Notice of Proposed Rule Making, 60 Fed. Reg. 44296 (Aug. 25, 1995).

originating toll traffic destined to an IXC's customer is directed to the IXC. Another way is for the IXC to establish a physical link to the CLEC's switch, similar in type to the tandem interconnection that typically exists between the IXC and the incumbent local exchange carrier, thereby creating a direct path between the CLEC and the IXC for the exchange of toll traffic. To permit the origination and termination of toll traffic, IXCs purchase—and CLECs provide—tariffed originating and terminating switched access services. Recently, several IXCs have publicly declared their intention to terminate the originating and/or terminating switched access services provided by the CLECs which, as explained below, would violate Sections 201(a) and 251(a)(1) of the Communications Act.

Section 201(a) of the Communications Act requires common carriers to establish physical connection with other carriers where the Commission has found such action necessary or desirable in the public interest. Likewise, Section 251(a)(1) of the Communications Act requires all telecommunications carriers, which include IXCs and CLECs, to interconnect with each other. In the *Local Competition Order*, the Commission found that the duty to interconnect, directly or indirectly, is central to the Communications Act and achieves important policy objectives.[57] The Commission thus has determined that telecommunications carriers are obligated to *directly* (*i.e.,* physically) or *indirectly* interconnect with other telecommunications carriers. If an IXC refuses to carry originating toll traffic from a CLEC or send terminating toll traffic to a CLEC, the IXC violates the interconnection provisions of Sections 201(a) and 251(a)(1).

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[57] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 997 (1996) ("*Local Competition Order*").

3. An IXC that Refuses to Interconnect with a CLEC, While Choosing to Interconnect with Other LECs, Violates Section 202(a) of the Communications Act.

One of the critical underpinnings of the Communications Act is nondiscrimination. The Commission has, in the past, steadfastly rejected attempts by carriers to confer preferential treatment upon similarly situated customers, including co-carriers. As noted above, some IXCs have publicly declared their intention not to interconnect with certain CLECs for the purpose of originating and terminating toll traffic, even as they acknowledge interconnecting with other similarly situated CLECs, including their affiliates, for the same purpose. The IXCs inappropriately base their refusal to interconnect on claims that the CLECs' rates for originating and terminating access are excessive. Yet, these IXCs continue to interconnect with—and compensate—other LECs (ILECs, CLECs, or both) whose switched access service rates are at, or even higher than, the CLECs' rates.

This action clearly violates the nondiscrimination requirements of Section 202(a). Section 202(a) declares it "unlawful for any carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . . ."[58] Accordingly, the Commission should affirm that an IXC that refuses to interconnect with a CLEC, while interconnecting with other LECs, has a heavy burden under Section 202(a) of the Communications Act of demonstrating that the discrimination is not unreasonable. In any event, to the extent the IXCs' preferential practices undermine the continuing viability of local exchange competition by conferring

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[58] 47 U.S.C. § 202(a).

gratuitous advantages on a select number of telephone exchange providers, discrimination of this type cannot be justified on any reasonable grounds.

4. Termination of Long Distance Service to CLEC Customers, without Proper Notice and Application, Violates Section 214(a) of the Communications Act and the Commission's Implementing Regulations.

As ALTS discussed above, ALTS does not believe that an IXC may lawfully refuse long distance service to CLEC customers. Even assuming, *arguendo*, that an IXC may terminate long distance to a class or community of long distance service consumers, it may not lawfully terminate service without having first obtained authorization from the Commission and notified the affected customers.

Section 214(a) of the Communications Act provides that "[n]o carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby . . . ."[59] In turn, Section 63.71 of the Commission's rules requires domestic non-dominant carriers to notify all affected customers of the planned service discontinuance, and to file with the Commission an application to discontinue, reduce, or impair service.[60] Accordingly, the Commission should clarify that termination of service to a CLEC's customers is a discontinuance of service under Section 214(a) of the Communications Act, which triggers the notice and application requirements of Section 63.71 of the Commission's rules. The Commission must insist that all IXCs intending to terminate

[59] 47 U.S.C. § 214(a).

[60] 47 C.F.R. § 63.71.

long distance service to customers of the CLECs must comply with the Commission's procedural requirements. Failure to do so inevitably will result in wholesale customer confusion and uncertainty. In any event, as a matter of law, ALTS does not believe that termination of service to customers on the basis of the customers' choice of telephone exchange provider can be reasonably reconciled with the public convenience and necessity.

D. If the Commission Finds that Termination is Permissible, it Must Impose Certain Minimum Requirements on the IXC, Including But Not Limited to Compliance with the Bureau's Mandates in *MGC v. AT&T*, Prior to the IXC's Termination of Long Distance and Switched Access Services.

ALTS does not believe that termination of long distance service to CLEC customers on the basis of the customers' choice of telephone exchange provider can be justified on any lawful grounds. Similarly, ALTS doubts that an IXC may refuse to interconnect with a CLEC, for the purpose of originating and terminating toll traffic, without violating several provisions of the Communications Act and this Commission's rules and decisions, as more fully explained above. Nevertheless, in the unlikely event that the Commission concludes that IXCs may terminate long distance service to CLEC customers and, moreover, that they may decline to interconnect with CLECs, the Commission must impose certain minimum requirements on the IXCs, including but not limited to, full compliance with the mandates of the Bureau in *MGC v. AT&T*. These mandates are legally sound and, as a matter of law and public policy, must be applied in all instances in which an IXC desires to, among other things, terminate its long distance service to CLEC customers.

In *MGC v. AT&T,* the Bureau observed that AT&T "failed to take certain steps that . . . a carrier likely would take if it truly wished to terminate a LEC's originating access service. Chief among these steps is initiating the process of migrating AT&T's and MGC's shared customers to either a new LEC or a new IXC,"[61] including "initiating talks with MGC on how the shared customers would be contacted and notified of the requirement that they switch either local or long distance providers."[62] The Bureau's decision thus contemplates that, assuming an IXC may terminate a CLEC's switched access service, the IXC is expected to coordinate with the CLEC in order to permit their shared customers to choose a different long distance or telephone exchange carrier. The Commission should enforce the Bureau's mandates and require all IXCs to comply with them prior to terminating service.

Enforcement of the Bureau's mandates is necessary—and indeed critical—because the IXC's customers must be notified of the IXC's intent to terminate service, and properly informed of their right to choose their carrier. Customer confusion is inevitable if the customers are not timely and properly advised. Since it is the IXC—and not the CLEC— that chooses to terminate service, the IXC appropriately must coordinate with the CLEC and bear the burden and cost of informing its long distance customers. In addition, compliance with the Bureau's mandates is necessary because failure to solicit the customers' consent prior to migrating them to another carrier could put the CLEC in direct violation of the Commission's "slamming" rules. As the "executing carrier" under the Commission's rules, it is the CLEC who is responsible for making all the necessary

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[61] *MGC v. AT&T,* at 13.

[62] *Id.* at 10.

presubscription changes, and it ultimately is responsible for unauthorized carrier changes.[63]

In addition, to insisting that IXCs comply with the Bureau's mandates in *MGC v. AT&T,* the Commission also should insist that the IXC demonstrate full compliance with its obligations under all applicable statutes, regulations, and orders. This includes, but not necessarily limited to, providing demonstrable proof that the IXC is not in violation of its tariffs and long-term subscriber contracts.

Finally, in the unlikely event that an IXC demonstrates that it may lawfully refuse to interconnect with a CLEC under the Communications Act and the Commission's rules and decisions, the Commission should require the IXC to compensate the CLEC for any expenses incurred in blocking traffic, if the IXC is itself unable to block traffic. The onus of blocking appropriately should fall on the IXC. Likewise, the expense associated with blocking properly should be imposed on the IXC because it is the IXC—not the CLEC—that chooses to not accept or send toll traffic. This Commission's policy and practice has been to impose the costs on the cost-causer,[64] and there is no legitimate reason why the Commission should depart from that long-standing practice here.

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[63] *See Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, 14 FCC Rcd 1508 (1998).

[64] *See, e.g., Sprint Corporation Request for Declaratory Ruling Regarding Application of PICCs*, 13 FCC Rcd 10220, 12 CR 339, 1998 FCC LEXIS 2432 (1998) (reaffirming the proposition that costs should be recovered in a manner that reflects cost-causation principles).

V. THE COMMISSION SHOULD NOT ELIMINATE USAGE SENSITIVE RATES FOR LOCAL SWITCHING AT THIS TIME.

The Commission has sought comment on whether it should adopt a "capacity-based" pricing structure for access charges that recover the cost of local switching. It should not take such action at this time.

Departure from usage-based local switching rates would be a radical – and unnecessary and undesirable – departure from established Commission precedent. The Commission has for years acknowledged that significant portions of local switches are traffic-sensitive. In the *Local Competition Order*, the Commission itself prescribed proxy rates for local switching that combined per-minute charges with flat-rated charges.[65] Two years later, concluding a seven-year evaluation of shared transport rates, the Commission determined that such rates should continue to retain a per-minute, usage-sensitive component along with flat-rated charges.[66]

Moreover, this proposed fundamental change in rate structure also cuts against the long-running trend of Commission decisions moving away from rate-base-oriented costing and pricing. Recognizing that, the Commission has been moving away from cost-based rate regulation for more than ten years. The Price Cap rules largely break the direct connection between costs and rates on a service-by-service basis, and rely instead on market forces and regulations (such as the X-factor) that mimic the effect of market forces. The "capacity-based" pricing proposals being proferred to the Commission in this

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65 *Local Competition Order* at ¶810 et seq.

66 *See Transport Rate Structure and Pricing Resale, Shared Use and Split Billing*, CC Docket No. 91-213, 13 FCC Rcd 6332 ("*Split Billing Decision*") at ¶6.

proceeding actually represent a throw-back to a bygone era, when complicated rate-based regulation unreasonably limited carriers' pricing discretion and ability to price according to market demands.

The existing template of per-minute and flat-rated charges provides a clear, readily understandable set of standards that provides a reasonable approximation of costs. Replacing it at this point with vaguely defined "capacity-based" rates would be enormously disruptive to the industry. In the first instance, it would represent a radical departure for state regulatory commissions, many of which require ILECs to establish intrastate access charges that mirror federal charges. For these states, the change in costing methodologies could have a disruptive impact on state universal service subsidy programs and regulatory fee structures. Moreover, in an attempt to follow the carefully considered ratemaking guidelines adopted by the FCC in the *Local Competition Order*, most states have adopted per-minute total element long-run incremental cost ("TELRIC") pricing requirements in setting rates for interconnection and resale. Given the enormous amount of time, effort, and resources that states put into those proceedings, a Commission decision to shift to a different costing standard at this late date would necessitate major new rate cases that would impose an enormous regulatory burden on state regulators and competitive carriers.

The second problem with such a change in rate structures is that it would severely disadvantage small and mid-sized telecom users and the service providers that target that market. Any unfounded change from per-minute charges to capacity-based charges would effectively reduce the costs of the largest-volume users of telecommunications while effectively increasing the rates for smaller users. The Commission has taken steps in the past to avoid such an outcome on public policy grounds. Thus, when the equal charge requirement of the Modified Final Judgment expired in 1991, the FCC recognized the potentially catastrophic effect on small IXCs and ordered ILECs to maintain the equal charge rate structure pending further, carefully considered agency action.[67] While the Commission later adopted a flat-rated component for access transport rates, it preserved a per-minute component, as noted above, in what it referred to as the "Final Transport Rate Restructure."[68] There is no compelling policy reason not to continue to rely on market forces to ensure reasonable rates, and there are compelling policy reasons not to effectuate access changes that will disadvantage smaller users.

Third, per-minute local switching charges are a fundamental component of shared transport. This element has been affirmed by a Court of Appeals.[69] Any Commission action that would disrupt this element would be profoundly disruptive to the carriers that rely on it.

Finally, reciprocal compensation is set on a per-minute basis by the vast majority of state regulatory commissions, and the largest component of reciprocal compensation is the recovery of TELRIC-based rates for local switching. Any action by the Commission that would disrupt this compensation mechanism would be enormously disruptive to the industry. For the past two years, the industry has been roiled by litigation before state

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[67] *MTS and WATS Market Structure, Transport Rate Structure and Pricing*, Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 5341, 5344 (1991).

[68] *Split Billing Decision* at ¶6.

[69] 153 F.3d 597 (8th Cir. 1998).

public utility commissions and the courts. This process has been further agitated by the Commission's recent decisions on the jurisdictional nature of DSL-based services, which led to another round of litigation that is continuing to this day.[70] Yet another regulatory decision by this Comission that would impact the reciprocal compensation rate structure would impose more uncertainty and more litigation expense on the CLEC industry. The Commission has an open proceeding on the future of reciprocal compensation[71] and will address this matter directly – it should not take any other action that may implicate reciprocal compensation outside the parameters of that proceeding.

VI. OTHER ISSUES

A. The Commission Should Confirm that 800 and 888 Services Should be Treated as Terminating Access for All Purposes.

The Commission notes that in the case of originating access associated with "open end" services, such as 800 or 888 calls, the party paying for the call does not choose the access provider and thus has little or no ability to influence the calling party's choice of access provider. Because this is the same situation for terminating access, the Commission has treated the originating access associated with such calls as terminating access for all purposes for many years.[72] In the *Notice* the Commission solicited comment on whether such regulatory treatment should be retained for ILECs and whether

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[70] *GTE ADSL Tariff Decision*, 13 FCC Rcd 22466 (1998), *clarified on recon.*, 1999 FCC LEXIS 822 (February 26, 1999).

[71] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98, 14 FCC Rcd 3689 (1999).

[72] Section 69.105(b)(iii) provides that "all open end minutes on calls with one open end (e.g., an 800 of FX call) shall be treated as terminating minutes."

this approach should be extended to CLECs. The few comments that the Commission received on the issued favored retention of the status quo precisely because the party paying for the 800 or 888 service has little ability to influence the calling parties' choice of access provider. Consequently, in the *First Report and Order*, the Commission decided to continue to treat "open end" originating minutes as terminating minutes. However, the Commission did not decide the issue of whether to extend this approach to CLECs.

In the *Notice* the Commission again asks parties to comment on the regulatory treatment of CLEC-provided "open end" originating minutes and whether they should be treated the same as terminating minutes for access charge purposes. It would make no sense to treat CLEC originating minutes for these services any differently than the Commission has treated ILEC minutes for these originating services and in fact the Commission gives no reason for different treatment. The exact same reasoning that the Commission used in determining that ILEC originating minutes for "open end" services should be treated as terminating access applies with equal force to the CLEC provision of such service. Therefore, the Commission should find that that for both ILECs and CLECs originating minutes for "open end" services should be classified as terminating minutes and that the associated access charges are treated as terminating access charges for all purposes.

B. The Commission Should Not Expand its Permissive Detariffing of CLEC Access Charges to Require Mandatory Detariffing.

ALTS firmly believes that its proposal that the Commission adopt a benchmark rate level for CLEC access charges that will be deemed presumptively reasonable is the best means of insuring that both CLEC rates are, in fact, reasonable and that business relationships between CLECs and IXCs are predictable and stable. The Commission has asked for comment, however, on whether it should order mandatory detariffing of CLEC interstate access charges, which the Commission believes would eliminate the CLECs' ability to set unreasonable terminating access rates by filing a tariff.

Aside from the significant issues as to the Commission's authority to mandate detariffing[73] it would be very bad policy to impose mandatory detariffing on the industry. Permissive detariffing, which gives new competitors the flexibility they need to decide whether to provide service pursuant to tariff or not, has worked well and should not be changed or expanded to require mandatory detariffing.[74] First, mandatory detariffing would deprive the Commission of the only reliable and efficient method it now has of tracking CLEC access charges. Second, mandatory detariffing could be very costly for CLECS. Pressure from the IXCs could result in extremely time-consuming individual negotiations, driving up the costs of access provided by CLECs. The Commission should

[73] The Commission attempted to require mandatory detariffing by the IXCs in 1996. That order has been stayed, *see MCI Telecommunications Corp. v. FCC*, No. 96-1459 (D.C. Cir. filed Feb. 13, 1997). In the *Notice* the Commission admits that the "court's ultimate decision [in the MCI case] likely will implicate our ability to impose mandatory detariffing on CLECs. *Notice* at ¶ 246.

[74] Permissive detariffing of CLEC provision of access services was adopted in *Hyperion Telecommunications, Inc., Petition for Forbearance*, Memorandum Opinion and Order, 12 FCC Rcd 8596

be very loathe to take such an action, particularly for new carriers. In addition, in many instances providing services via tariff will be the most efficient method of making their terms and conditions known to potential users.

ALTS has consistently supported permissive detariffing[75] and, as noted, believes that it has worked well. There may be reasons why a CLEC may want to negotiate individually with customers and that CLECs ought to have the option of doing so. But there is no benefit to be gained by forcing new carriers to detariff their services.

C. IXCs Should Not be Allowed to Charge Different Rates to End Users within the Same Geographic Area based upon the Level of Charges Levied by the End User's Local Exchange Company.

The Commission has asked parties to comment on whether any perceived market failure could be solved if IXCs were allowed to charge different rates to end users within the same geographic area based upon the level of access charges levied by the end user's local exchange company. The Commission reasons that because end user IXC bills would fluctuate depending upon on the level of access charges, the end user would have the incentive to switch to LECs that charge lower access rates.

It is difficult for ALTS to comment on this proposal as the *Notice* does not give many details. The difficulties that the Commission itself has raised concerning the Section 254 requirements relating to the requirements that IXCs charge similar rates in

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(1997). As the Commission noted in Footnote 443 of the *Notice*, the Commission also issued, concomitant with the *Hyperion* order and NPRM on the mandatory detariffing of CLEC access charges.

[75] ALTS has consistently supported permissive (but not mandatory) detariffing. See Comments filed in In the Matter of Forbearance from Enforcement of Tariff Filing Requirements Codified at Section 203 of the Communications Act for Non-Dominant Carriers (the Time Warner petition), CCB/CPD 96-7 (filed July 8, 1996); Comments filed in the Matter of Reinstatement of the Commission's Permissive Detariffing Policy for Competitive Access Providers Pursuant to Section 10 of the Communications Act of 1934, as Amended (the Hyperion petition), DA 96-462 (filed May 23, 1996).

urban and rural areas would be a significant impediment to this proposal. But even more important to ALTS are the questions that would be raised as to how the IXCs would determine and portray the rates charged by CLEC vs. ILEC, how the billing would be accomplished, and how the IXC would handle questions that may be raised by consumers about their bills.

It is unclear whether the Commission is proposing only that the IXC be allowed to charge different rates or whether IXCs would also be allowed to characterize the different rates on the bills as being caused by CLEC access rates. Because of the different rate structures identified, consumers could be presented with information that is inaccurate and prejudicial to CLECs. For example, as we have noted above, CLECs employ a different rate structure than ILECs that makes any simple comparison difficult. ILECs impose more flat-rated charges on IXCs and CLECs impose more usage-based charges. If an IXC were to set its rates based only upon the different per-minute charges (which is what AT&T seems to be so concerned about in its petition) the CLEC customer would be penalized more than the difference between the full ILEC rate and the CLEC rate. And if the IXC were allowed to include the per minute charges on the bill, it would appear to the end user that ILECs are charging less than the CLECs, when, in fact as shown above the total charges to the IXCs (and ultimately the consumer) are similar. And, even if the Commission were to mandate that the ILECs include the full complement of charges that the IXCs pay to ILECs in their calculation, as demonstrated by the study commissioned by ALTS, it is not an easy task to try to determine precisely what the full amount of the ILEC charges are on a per-minute basis. Finally we are concerned about the IXC answering questions about the different rates and their ability to characterize CLEC rates in any manner that they wish.

Because the of the complexity in resolving the differences in disparate rate structures, ALTS cannot support the unbundled bill proposal at this time. If the Commission were to adopt such a requirement ALTS suggests that it should do so only if it commences a rulemaking specifically designed to adopt truth in billing requirements that would result in a fair comparison of access rates. Otherwise such a requirement could result in consumer information that is inaccurate and prejudicial to CLECs[76].

D. The Commission May Consider Equalizing Originating and Terminating Access Charge Rate Levels if Further Information Received by the Commission Indicates that Market Forces are Inadequate to Ensure Reasonable Access Charges.

As ALTS has demonstrated above, the majority of CLEC access rates are not significantly higher than ILEC access rates. There has been no demonstration of any market failure to justify many of the proposals that the Commission has put forth. Therefore, the Commission should continue to rely upon market forces to ensure that access charges reasonably reflect costs.

Although the information that we have demonstrates that most CLEC access charges, including both originating and terminating, are reasonable, we recognize that in some cases, but not all, terminating rates are greater than originating rates. In addition, most of the complaints that IXCs have voiced relate to terminating charges. Therefore, if additional information is forthcoming that indicates that CLEC (or ILEC) terminating rates are not reasonable or are not declining as would be expected due to competitive forces, ALTS would have no objection to the Commission considering (perhaps during its biennial review of regulations) requiring the equalization of originating and

[76] Considering the conflict and difficulty that the Commission has had in adopting its recent Truth-in-Billing rules, it would not seem to be a good use of the Commissions resources at this time to commence such a proceeding and, therefore, ALTS suggests that the idea of bill unbundling be shelved at least for the time being. *See Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-170, 14 FCC Rcd 7492 (1999).

terminating access rate levels or establishing a presumption that carrier charges are reasonable if the originating and terminating charges are equal.

CONCLUSION

For all the foregoing reasons, ALTS recommends that the Commission (a) adopt a benchmark analysis to determine presumptively reasonable rates for competitive local carriers; (b) find that any CLEC that sets its access charges within the range of reasonableness will be entitled to a strong presumption that is rates are just and reasonable; and (c) reiterate that self-help refusal by an IXC to pay a CLEC's access charges is not justified, and that carriers wishing to dispute such rates must use the enforcement mechanisms that the Commission has established. ALTS further recommends that the Commission retain the existing structure of flat-rated and per-minute charges for recovery of interstate access charges by dominant local exchange carriers, and that it follow the other recommendations in these comments.

Respectfully submitted,

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